

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**In re: SUBPOENA FOR INSPECTION  
AND SAMPLING OF PREMISES  
OWNED BY NON-PARTIES IN THE  
MATTER OF:**

**STATE OF OKLAHOMA, et al.  
Plaintiffs**

**vs.**

**TYSON FOODS, INC., et al.,  
Defendants.**

**Case No. 4:05-CV-00329-TCK-SAJ**

**MOTION TO QUASH  
SUBPOENAS FOR INSPECTION AND SAMPLING  
OF PREMISES OWNED BY NON-PARTIES OR ALTERNATIVELY,  
MOTION FOR PROTECTIVE ORDER AND BRIEF IN SUPPORT**

Come now certain non-parties, now referring to themselves as “2006 Poultry Growers”, as follows: Bill R. Anderson, Steve Butler, Green Country Farms, Julie Anderson Chancellor, Roger D. Collins, Franklin A. Glenn and Kenneth D. Glenn and Sondra D. Glenn, Juana Loftin, Larry McGarrah and Priscilla McGarrah, Jim L. Pigeon, Michelle R. Pigeon, Joel J. Reed and Rhonda Reed and Caleb Reed and Cory Reed, W.A. Saunders and Bev Saunders, Robert V. Schwabe, II, David R. Wofford and Robin L. Wofford, and Ren Butler and Georgia Butler, by and through their undersigned counsel. Also come now certain non-parties, herein referred to as “2007 Poultry Growers”, namely Ernest Doyle, Jr., Clyde Masters and Helen Masters, Dwayne O’Leary, Ricky Reed, Bill Engleman and Barney Nubbie, by and through their undersigned counsel. The 2006 Poultry Growers and the 2007 Poultry Growers (hereinafter collectively referred to as “Poultry Growers”) respectfully submit this Motion to Quash, or alternatively,

Motion for Protective Order regarding subpoenas served upon them in 2006 and in 2007, requiring said non-parties to submit to inspection and sampling of premises, because said subpoenas: (i) are oppressive, overly broad, and unduly burdensome; (ii) seek the discovery of irrelevant information not reasonably calculated to lead to the discovery of admissible evidence, and (iii) are dangerous to Poultry Growers businesses. Plaintiff is well aware and this Court should be advised that Infectious Laryngotracheitis ("LT") disease has arrived early in Northeastern Oklahoma this year. In accordance with Local Rule 37.1, counsel for the Poultry Growers and Plaintiff have conferred and have been unable to resolve this dispute. The Poultry Growers adopt and incorporate by reference all of the allegations, the Argument and Authorities set forth in Section II, sub-parts A, B, C, and G, requests for relief set forth in, and documents attached to that certain *Objections and Motion to Quash Subpoenas for Inspection and Sampling of Premises Owned by Non-Parties, or Alternatively, Motion for Protective Order and Brief in Support* (Docket #493) filed in the Northern District of Oklahoma on May 1, 2006, by the 2006 Poultry Growers, as if fully set forth herein. The Poultry Growers ask that the subpoenas be quashed or, alternatively, that this Court enter a Protective Order preventing Plaintiff from entering onto Poultry Growers' premises until after the current outbreak of LT disease has passed.

### **I. INTRODUCTION**

As the Court is aware, in its May 31, 2006 Order (Dkt No. 757), the Court denied the 2006 Poultry Growers' *Objections and Motion to Quash Subpoenas for Inspection and Sampling of Premises Owned by Non-Parties, or Alternatively, Motion for Protective Order and Brief in Support* (Docket #493). In the Order, the Court made it clear that its determination that Plaintiff had adequately demonstrated relevance was substantially based upon Plaintiff's allegation "...that the IRW has been polluted and that **improper poultry waste disposal practices are**

**responsible for pollution.”** (Page 4 of the Order, emphasis added) Poultry Growers respectfully suggest that sixteen (16) months after this Court ordered the 2006 Poultry Growers to submit to inspections and invasive samplings of their properties, Plaintiff still has not provided the Court with a shred of evidence that the Poultry Growers are engaging in or have engaged in “improper waste disposal practices ...” To the extent that the Court relied upon Plaintiff’s allegations of improper poultry waste disposal practices, the Poultry Growers respectfully suggest that such reliance is no longer justified and that Plaintiff should be required to establish a relevance connection between the alleged contamination of the Illinois River and the invasive, overly broad and burdensome discovery Plaintiff seeks from the Poultry Growers. The Poultry Growers ask that the Court quash all pending subpoenas requiring the Poultry Growers to allow Plaintiff access to their farms.

## **II. ARGUMENT AND AUTHORITIES**

### **A. Applicable Standard of Review**

In its May 31, 2006 Order (Dkt No. 757), the Court stated the standard that it would apply to the Poultry Growers’ objections to the Plaintiff’s subpoenas, as follows:

Whether a burdensome subpoena is reasonable must be determined according to the facts of the case, such as the party’s need for the documents and the nature and the importance of the litigation. To determine whether the subpoena presents an undue burden, we consider the following factors: (1) relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; (6) the burden imposed. Further, if the person to whom the document request is made is a non-party, the court may also consider the expense and inconvenience to the non-party. A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad. Generally, the modification of a subpoena is preferable to quashing it outright.

Page 3 of the May 31, 2006 Order.

The Poultry Growers recognize that they bear the burden of proving that Plaintiff's subpoenas are unduly burdensome. However, the Poultry Growers ask the Court to recognize that "concern for the unwanted burden thrust upon non-parties is a factor entitled to **special weight** in evaluating the balance of competing needs." Cusumano v. Microsoft Corp., 162 F. 3d 708, 717 (1st Cir. 1998) (emphasis added).

**B. The Plaintiff has Failed to Connect Up the Relevance Chain to Support Its Burdensome Discovery Requests**

In its May 31, 2006 Order (Dkt No. 757), this Court recited Plaintiff's relevance chain that led the Court to conclude that Plaintiff had adequately demonstrated relevance for its 2006 subpoenas served upon 2006 Poultry Growers. Specifically, this Court stated on Page 4 of its Order:

Plaintiff alleges that various entities and individuals engage in poultry growing operations on the various properties upon which subpoenas have been issued. Plaintiff alleges that such poultry growing operations generate poultry waste, and that the poultry waste is handled, stored, and disposed on lands within the Illinois River Watershed ("IRW"). Plaintiff alleges that the IRW has been polluted and **that improper poultry waste disposal practices are responsible for the pollution.** Plaintiff notes that poultry waste includes numerous elements including phosphorus, nitrogen, arsenic, zinc, copper, hormones, and microbial pathogens. Plaintiff also notes that elevated levels of these substances exist in the waters of the IRW. Plaintiff has adequately satisfied the relevancy requirement of Plaintiff's requests. (Emphasis added)

Without admitting or agreeing with any of Plaintiff's allegations, Poultry Growers ask this Court to focus upon the emphasized language of the Order. Fortunately for the Poultry Growers, Plaintiff's allegation that improper poultry waste disposal practices are occurring is absolutely without basis and wholly inaccurate. After sixteen (16) months of discovery opportunities made available by this Court, Plaintiff has not provided a shred of evidence to support this allegation. As a result, the discovery accommodation this Court provided to the Plaintiff during that sixteen

(16) months has been shown to be absolutely without justification, and detrimental and burdensome to the Poultry Growers.

**C. Plaintiff Has Not Demonstrated Its Need for Additional Invasive Sampling of the Poultry Growers' Properties**

This Court will recall that in 2006 an inordinate amount of time and resources were expended by this Court, the Parties, and the 2006 Poultry Growers, in dealing with Plaintiff's requests for invasive sampling of the Poultry Growers' properties. In part, Plaintiff represented to this Court Plaintiff's dire need for groundwater data and storm water run-off data from the Poultry Growers' properties. To the best of the Poultry Growers' knowledge, in the last sixteen (16) months Plaintiff only made one abortive effort to collect groundwater samples from one Poultry Grower, i.e. Bill Anderson, and has not attempted to collect a single storm water run-off sample from any of the Poultry Growers.

The Poultry Growers have asked Plaintiff for written assurance that there will be no further invasions of their properties to collect groundwater and/or storm water run-off. Plaintiff has refused to give such assurance. As a result, the Poultry Growers now ask this Court to quash the subpoenas for collection of groundwater and/or storm water run-off samples from the Poultry Growers' properties.

With regard to Plaintiff's subpoenas served upon 2007 Poultry Growers and Green Country Farms, the Poultry Growers respectfully suggest that Plaintiff has not demonstrated its need for further invasive sampling of litter and soil, particularly since Plaintiff is well aware of the current outbreak of LT disease, a devastating and highly contagious disease for poultry. When counsel for the Poultry Growers asked Plaintiff's counsel why Plaintiff needs to again invade non-parties' properties, the only reason given is that there are "data gaps for some of the Integrators that our experts need filled." There has been no suggestion by Plaintiff that the 2007

subpoenas are needed because the 2007 Poultry Growers have engaged in or are engaging in improper poultry litter disposal.

With regard to Green Country Farms, this Court made it clear that “Plaintiff may enter each premise one time for soil, poultry litter, and groundwater sampling.” See May 31, 2006 Order (Dkt No. 757), Page 6. Plaintiff did enter Green Country Farms’ premises in 2006 to collect soil and poultry litter samples and now seeks to do so again. When counsel for Green Country Farms asked Plaintiff’s counsel why Plaintiff seeks to again invade Green Country Farms’ premises, the only reason given was a vague statement of dissatisfaction with the results of the litter sampling and a need to do it over due to possible errors by the Plaintiff’s environmental consultant. Green Country Farms respectfully suggests that Plaintiff’s dissatisfaction with the results of litter sampling conducted by or complaints about the competence of Plaintiff’s environmental consultant is not a compelling showing of need nor sufficient reason to expose Green Country Farms to another invasion by Plaintiff or unnecessary exposure to LT disease.

As previously stated, Plaintiff has not provided this Court with a shred of evidence to demonstrate that any Poultry Grower has improperly disposed of poultry litter. In the absence of a threshold showing that any particular Poultry Grower has been guilty of improper poultry litter disposal, the Poultry Growers respectfully urge this Court to decline to find that Plaintiff has demonstrated its need for invasive sampling of that Poultry Grower.

**D. Plaintiff’s Discovery Requests are Unreasonable in Time Period**

As previously stated, Plaintiff has had sixteen (16) months within which to carry out any discovery it “needed” from Poultry Growers. The quiet enjoyment of their property has been denied the 2006 Poultry Growers for that entire period because they have lived with the constant knowledge that they were just a telephone call away from another invasion by Plaintiff for

groundwater or storm water run-off sampling. The Poultry Growers respectfully urge the Court to tell the Plaintiff that enough is enough and that the time for invasive sampling is over.

**E. These Subpoenas are Unduly Burdensome**

As the Poultry Growers have previously suggested to the Court, the nub of the matter is that Plaintiff's requests are simply unduly burdensome for a non-party. In the absence of a threshold showing that there is a relevance connection between the discovery sought and the injury about which Plaintiff complains, no non-party should have its life and business interrupted and the quiet enjoyment of its property destroyed. The Poultry Growers respectfully ask this Court to recognize how burdensome it is for small businesses such as theirs to endure the interruptions and aggravation that accompany Plaintiff's plans for invasion of these rural settings.

For all of the reasons previously stated, the subpoenas should be quashed. Alternatively, the Plaintiff should be precluded from entry upon the Poultry Growers' premises until after the current outbreak of LT disease passes.

**III. CONCLUSION**

For the reasons stated above, Poultry Growers request that the Court quash the Subpoenas until such time as the Plaintiff has demonstrated relevance and need. Further and in the alternative, the Poultry Growers would ask that a protective order issue directing that the Plaintiffs' proposed discovery activities be stayed until such time as the current LT disease outbreak is over.

Respectfully submitted,

s/ D. Kenyon Williams, Jr.

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**CERTIFICATE OF SERVICE**

I certify that on the 5th day of October, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached document by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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